COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Enforcement of copyright

THURSDAY, 30 SEPTEMBER 1999

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 30 September 1999

Members: Mr Kevin Andrews *(Chair)*, Ms Julie Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Murphy, Mr Ronaldson, Ms Roxon, Mr St Clair and Mrs Danna Vale

Members in attendance: Mr Andrews, Ms Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Murphy, Ms Roxon and Mrs Vale

Terms of reference for the inquiry:

(1) The Committee will inquire into and report on issues relevant to the effective enforcement of copyright in Australia and, in particular, on:

(a) evidence of the types and scale of copyright infringement in Australia including:

(i) the availability and accuracy of data on copyright infringement;
(ii) the scale of infringement in Australia in comparison with countries in our region and Australia's major trading partners;
(iii) the geographical spread of copyright infringement in Australia;
(iv) the cost of infringement and impact on Australian business;
(v) whether there is evidence of the involvement of organised crime groups in copyright infringement in Australia, and if so, to what extent;
(vi) likely future trends in the scale and nature of copyright infringement.

(b) options for copyright owners to protect their copyright against infringement, including:

(i) actions and expenditure undertaken, and that could be undertaken, by copyright owners to defend their copyright;
(ii) use of existing provisions of the *Copyright Act 1968*;
(iii) use of legislative provisions other than those of the *Copyright Act 1968*;
(iv) technological or other non-legislative measures for copyright protection.

(c) the adequacy of criminal sanctions against copyright infringement, including in respect of the forfeiture of infringing copies or devices used to make such copies, and the desirability or otherwise of amending the law to provide procedural or evidential assistance in criminal actions against copyright infringement;

(d) the adequacy of civil actions in protecting the interests of plaintiffs and defendants in actions for copyright infringement including the adequacy of provisions for costs and remedies;

(e) the desirability or otherwise of amending the law to provide further procedural, evidential or other assistance to copyright owners in civil actions for copyright infringement;

(f) whether the provisions for border seizure in Division 7 of Part V of the *Copyright Act 1968* are effective in the detention, apprehension and deterrence of the importation of infringing goods, including counterfeit goods; and

(g) the effectiveness of existing institutional arrangements and guidelines for the enforcement of copyright, including:

(i) the role and function of the Australian Federal Police, and State Police exercising Federal jurisdiction, in detecting and policing copyright infringement;

(ii) the relationship between enforcement authorities and copyright owners;
(iii) the role and function of the Australian Customs Service at the border in detecting and policing copyright infringement; and
(iv) coordination of copyright enforcement.

(2) In undertaking the inquiry and framing its recommendations, the Committee will have regard to:

(a) Australia's obligations under relevant international treaties, in particular under the World Trade Organisation *Agreement on Trade Related Aspects of Intellectual Property Rights*;

(b) the provisions of the *Copyright Act 1968* and any amendments to that Act that have been introduced or have been publicly proposed by the Government, to be introduced into Parliament;

(c) established principles of criminal and civil procedure which apply in cases generally;

(d) Commonwealth criminal law policy;

(e) enforcement regimes for other forms of intellectual property;

(f) existing resources and operational priorities of Government enforcement agencies; and

(g) the possible effect of any proposed changes on the operation of Government and private sector organisations.

WITNESSES

Committee met at 10.43 a.m.

FRANCIS, Mr Keven Ronald, Executive Director, National Indigenous Arts Advocacy Association

JANKE, Ms Terri Ann, Consultant, National Indigenous Arts Advocacy Association

CHAIR—As a reminder to members of the committee, the witnesses appearing before us now appear in relation to the general inquiry into the enforcement of copyright, not specifically the Copyright Amendment (Digital Agenda) Bill 1999. I welcome Mr Francis and Ms Janke, from the National Indigenous Arts Advocacy Association.

Mr Francis—Mr Chairman, thank you for inviting us to this inquiry. I have to apologise for our chairperson, Dr Charles Perkins, who was going to appear today. Unfortunately, due to personal reasons, he is not available.

CHAIR—I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as the proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission of 23 August. Mr Francis, I think you were about to make some opening comments. Can I invite you to do so.

Mr Francis—Thank you. The National Indigenous Arts Advocacy Association advocates for the greater protection and recognition of indigenous artists' rights, values and cultural practices. We are concerned that indigenous arts and cultural expressions are open to exploitation, and the need for greater protection is quite urgent. Terri Janke is going to continue the opening presentation. Terri is the author of a recent publication *Our culture our future*, which is a report on Australian indigenous cultural and intellectual property rights. So I will hand over to Terri.

Ms Janke—Thank you, Keven. I would like to speak to the report *Our culture our future*, which was commissioned by the Australian Institute for Aboriginal and Torres Strait Islander Studies. It was funded by the Aboriginal and Torres Strait Islander Commission. It looks at the types of rights indigenous peoples want for the survival of their culture, and it looks at the existing legal framework, including intellectual property laws and heritage laws. It looks at shortfalls in those areas, and also puts forward a range of proposals, both legislative and non-legislative, to improve protection.

Copyright is covered in that report. I would like formally to give a copy to the committee, but individual copies will be sent to all the members of the committee. What the report finds is that existing intellectual property laws, including copyright, are inadequate in protecting indigenous cultural and intellectual property. We refer the committee to the table on 1(e) of NIAAA's submission.

For too long, indigenous arts and cultural expression has been seen as being in the public domain for copyright. It is not meeting the requirements of copyright, and that makes it easy to exploit. We are seeing our songs and music being reproduced overseas in recording

studios without the permission of indigenous custodians or their knowledge. We are seeing the knowledge of plants being sought after by international scientific and pharmaceutical companies, and used as a springboard for new medicines. Traditional sacred designs are being copied on T-shirts, tea towels and carpets. Many of them bear labels that say they are genuine or authentic when they are stylised rip-offs, pastiche designs that market heavily on them being genuine indigenous produced items.

NIAAA is establishing a label of authenticity. It is a certification mark which is registered with IP Australia. The idea is that it will be affixed to the genuine produced items so that consumers can identify the authentic products and, hopefully, buy them in preference to the rip-offs. This will increase the returns to indigenous artists.

As the committee will see from page 3 of our submission, NIAAA receives considerable calls relating to copyright matters. NIAAA assists by referring the inquiries to legal advisers. They have taken test cases like the carpets case. But there is a lot more to be done. NIAAA recommends that a wider survey be conducted to estimate the extent of indigenous copyright infringements.

CHAIR—I will stop you there because that is your first recommendation. Who should do such a survey? Perhaps I am being the devil's advocate, but what is the survey going to tell us that we do not already know? Let us accept your evidence. You are not the only ones to tell us this. Let us accept for the sake of discussion that there is a widespread infringement of copyright of works by indigenous peoples. What more will the survey help us?

Mr Francis—There is a genuine perception that there are a lot of rip-offs happening. When we speak to people across the country, it is common for them to say that there are a lot of rip-offs of Aboriginal designs throughout the country with products coming in from overseas. We need to get a broader national perspective on exactly what is happening.

Mr KERR—If there has been infringement, you have access to take those people apart. This is a common complaint before this committee that people are being ripped off. We have to deal with factual stuff. People who are responsible for their communities or their industries need to tell us the extent of the problem.

Mr Francis—What we are suggesting in this first recommendation is to have a thorough in-depth investigation into the depth of the problem in Australia.

Mr KERR—But if you do not know, nobody does.

Ms Janke—There are two levels to the extent of the infringement. There are those that NIAAA as a national body knows about. It has staff who are answering calls from all over Australia. The extent of the infringements is not known because a lot of times with the remoteness indigenous people are not letting NIAAA know or they are not able to know about their infringements and then do something about it. There are also those stylised rip-offs coming into the country that are not being policed either. That is why NIAAA is recommending that a further survey be conducted.

Ms JULIE BISHOP—Does your organisation maintain detailed records of the allegations and the proven infringements? There have obviously been a number of court cases—not many, but a number—and you must receive reports and carry out investigations. Do you maintain detailed records of all that?

Mr Francis—We keep records as part of our funding agreement with the Australia Council. We keep records of phone calls in and activities going on, yes.

Ms JULIE BISHOP—What do you do with the records? To whom do you provide the records for follow-up or investigation?

Mr Francis—If someone rings and has a problem that is specifically a breach of copyright, we refer them to an agency for legal advice as to the justification of their claim. That is the process. Inside the office we have to report to our funding bodies about the numbers, types and distribution of the complaints coming to our office.

Ms JULIE BISHOP—Do you have statistics or records available in the last 12 months or two years?

Mr Francis—We are getting between 20 to 30 inquiries each week.

Ms JULIE BISHOP—From artists?

Mr Francis—From artists or individuals associated with artists. They are asking questions about copyright and possible infringements and aspects related to cultural protocols.

Ms JULIE BISHOP—They are not necessarily complaints of an alleged infringement? They can be general inquiries as well?

Mr Francis—These are inquiries related to infringement problems. They are not just general inquiries about what NIAAA is doing with its other projects, for instance, which is concerts et cetera. They are specifically related to intellectual property.

Mr KERR—There are two issues: authenticity—which is a different issue from copyright—and copyright itself. Until recently, people were very free and easy about stealing designs and using them for themselves. The authenticity issue is one which you will be addressing by a certificate that you will advocate be attached to works with an agreement with major outlets, I understand.

Mr Francis—The authenticity label is related specifically to the artists. It is not something that will be given so much to businesses. Part of our core business is looking after the rights of individual artists. The label will go to individual artists to be put onto their work.

Mr KERR—You have not referred to it in the submission, but I wonder whether you think that needs some kind of legislative endorsement or whether the general laws about false and misleading advertising and the rest would be sufficient to protect them.

Mr Francis—Does this relate to the label itself?

Mr KERR—Yes. If you develop a label that you want to have integrity so that it flows from the maker of the works through to any retailing and subsequent sale, presumably you also want to have a system that does not allow people to use a similar device that may or may not be as strictly authentic or, indeed, to form certificates of authenticity and apply them.

Mr Francis—Certainly. We are going through the process of getting the label as a certified trademark. Under the act it will be protected. If you are referring to other marks that will be coming around the country, there are other authenticity marks. The terminology is quality assurance marks. For instance, Central Desert is looking at doing that. All of Arnhem Land and the northern Kimberleys are. Those labels will be sitting next to the NIAAA, or national label. From the commencement of developing the label, we have been in communication with similar bodies to say that the label will not just sit there by itself. It will sit with these other regional labels. The national label will have that certified trademark protection. It will have an emphasis across the country.

Mr KERR—This is not something you addressed in the submission, but when you have this certificate of authenticity in place, have you identified whether the law is sufficiently strong for the enforcement regime to ensure that it is not abused?

Mr Francis—From the information given to me by our solicitors, the Trade Marks Act itself is sufficient protection, provided, of course, that we have enough information to identify possible breaches of it, which is part of our overall business plan. We are looking for problems that have occurred where someone has copied the label. We have a business plan that will be looking throughout the country to police that. We also have organisations which will come on as effective local certifiers. These will be indigenous organisations across the country, which we can then call on. We can pay them a fee to check on any problems that are occurring with the trademark. We have done quite a lot of work on how to enforce it. We believe that through those networks and through the networks of indigenous people in the country, which is quite a considerable telegraph, we will be able to protect the trademark to quite a substantial level.

CHAIR—I interrupted you. Do you want to continue?

Ms Janke—I also want to say something about the point that we should know about the extent of the rip-offs. I work in private practice. We get a lot of complaints from indigenous artists about their artwork being ripped off. They have very little money to take up a case and certainly not enough to fund copyright litigation. We might send off a letter of demand to infringers. That can work sometimes. Often, because of things like the innocent infringement requirements, they write a letter and say, ‘Do not take us to court’.

There is still a belief that indigenous art is free for all and that we have always been able to use it, so there are questions about why should we pay licensing fees and stuff like that. There is a lot of infringement, but you might not hear about it in case law because it is still something that is being legally pursued and not open for general discussion.

Copyright is an area of law that indigenous artists are increasingly looking towards for protecting indigenous cultural and intellectual property. The NIAAA carpets case was successful. You had three living artists and five deceased coming together. NIAAA was a coordinating body. It was able to take this action. It was funded by the Australia Council and the Aboriginal and Torres Strait Islander Commission. It really extended the application of copyright law to indigenous arts.

The judgment of the cultural damages award was included in the award that von Doussa put in. An amount of $188,000 was awarded, but the indigenous artists and their families and clans never received one cent. Through the Corporations Law, the infringers were able to not be held to pay for their judgment. They also showed little remorse and understanding for what they had done to indigenous culture. The artists in that case said that cultural harm had been caused to them personally. They had an obligation to maintain the integrity of the work and they were put in a compromising position. The infringers never really understood that.

NIAAA recommends that there be stronger penalties for infringers of indigenous art. Further remedies that could be added which would meet the needs of indigenous copyright owners are the right to seek cultural harm damages and having that statutorily recognised. There is the right to ask for public letters of apology. It wants to require copyright infringers to meet with the indigenous communities and the artists to be made aware of the detriment that they are causing to indigenous cultures.

Ms JULIE BISHOP—In that case, I note from your submission that the offending carpet company directed the manufacturer to copy the works from publications by the National Gallery and a calendar from Australian Information Services. Was it the case that because those works had been authorised to be reproduced by the National Gallery and the like that they already had a profile? It was then much more likely that the infringement would come to the attention of the artists than if they had come across these works elsewhere. They already had a national profile. I am trying to get to the question of how one comes across instances of infringement. In that case, it seems that because the works already had a national profile through the gallery and whatever Australian Information Services produced the infringement was going to be far more evident.

Ms Janke—The infringers certainly picked very famous Australian artists to copy the works of without seeking permission. The works are in the Australian National Gallery collections and in the New South Wales Art Gallery.

Mr Francis—It appears it was opportune because it was published so the people could easily photograph it and use it on the carpets. From my understanding, the infringement was discovered in Perth, Western Australia. It was only by chance that it was discovered. I do not know whether the high profile was significant, but certainly it was opportune. It was sitting in a publication that could be reproduced. That was one of the reasons it was done, I imagine.

Ms Janke—In this particular case, NIAAA was alerted by an employee at a carpet shop in Sydney. The carpets were reproduced in Perth, but this employee saw them in Sydney and rang up NIAAA and said, ‘We’ve got these carpets with Aboriginal designs. Can you tell us

about them?' The staff who were at NIAAA at that time saw the carpets and said, 'They are really significant indigenous artists' works.'

Ms JULIE BISHOP—Did the National Gallery play a role in this case?

Mr Francis—Not that I know of, no.

Ms ROXON—You suggested having additional remedies. What would be the purpose of those? Is it because you have a view about generally educating the community about the importance of cultural rights that are being infringed, or do you think that, if they think that is one of the remedies that might be awarded, it is an effective disincentive for the infringers?

Ms Janke—I think it acts both ways. Indigenous people work that away anyway. They like to meet as a group. In a lot of the cases I have worked on, communities have sought that remedy—they ask, 'Can that person come and talk to us as a group, to understand?' Also, the likelihood that they will infringe again or use the designs in that way will be reduced. I can speak generally about this. When an infringer is notified that they have infringed indigenous art and that a substantial reproduction has occurred, they may then alter the design and get smart by saying, 'It's still Aboriginal art.' Because 10 per cent has been altered they say that they did not think it was a copy. Then they alter it again so that it becomes a very stylised form of indigenous art—like pastiche—so you may not be able to use copyright laws because it is not a substantial reproduction. It is still copying, but they are altering it more and more. It becomes stylised Aboriginal art, but not a copyright infringement of an existing work. That happens quite a lot. Meeting the community and seeing the harm done and seeing that particular styles are identifiable with communities—for example, you have Rarrt in Arnhem Land or the Mimi figures and the Wandjina in specific areas—would do a lot to increase understanding and reduce the likelihood of continuing infringing.

Ms ROXON—You made some comments earlier about how modern technology might make it easier for people to infringe copyright, but I understood that some of your more remote communities, particularly where you have world recognised artists, are using the Internet to scan new works and to set up some type of register—I do not know how it works—so that it makes it easier to protect the copyright. Or is it being done just for future sales rather than for copyright issues? Can you tell me anything about that?

Mr Francis—For example, an organisation at Yirrkala takes photographs of the works that are produced, usually with the artist, as a record of the authenticity of the work related to the specific person. That goes on, and I believe that some of the communities are looking at selling works on the Net, as well. I am not quite sure whether that is your question.

Ms ROXON—That is what I am asking about. I was asking whether that is happening and what consequences it had one way or the other for the copyright infringement. I guess if you had some capacity to register interests you could use that. It might be more helpful in remote areas than in others because the access is improved. I was just wondering whether you had any views about that, or what it is currently being used for. I was not sure of the extent of that practice.

Mr Francis—The extent to which communities in the centre and north of Australia have their arts centres taking photographs of the work—either digital or film—is very common, and it is developing more.

Ms ROXON—That is for the purposes of establishing authenticity and keeping records rather than copyright?

Mr Francis—Yes. From a business point of view, if they want to sell a product, it gives them a marketing edge if they know where the product has come from. It is a holistic approach to it.

CHAIR—I would like to ask about the significance of the art within a particular community. It seems to me that we are touching on a difference of cultural approaches here, which has consequences for the way in which the law develops. Let me take a moment to tease this out. The Copyright Act and the copyright laws are essentially about protecting a particular work—the substantial reproduction that you were talking about before. It does not, for example, stop one from painting in the style of Rubens or Brett Whitely or whoever. Within Western European culture, we do not regard that as being, in itself, an infringement. In fact, you go to art school to learn to copy the style of a great painter—at least you used to. That was the way in which you learnt and developed your own artistic ability. You can go to the National Gallery and look at great painters who have painted in the styles of others and learnt that way.

It seems to me that what you are getting at here—please correct me if I am wrong—is that there is something different in Aboriginal culture in the way it regards the art. This is leading me to the question about your suggestion that there should be legislation dealing with infringement, including indigenous cultural infringement. Talking about cultural infringement takes us into a different notion of communal property. I do not want to get tied down in a property argument, but it is a different notion of the communal relationship between the people, the community and the art. Is there something in that, or am I barking up the wrong tree?

Ms Janke—No, that is a good question. Art is a cultural identifier: it links you to your people, to your community and to where you come from in Australia. It is part of your spirituality. It is really an integral part of indigenous identity. When you talk about the differences in style and copyright works, there is an issue. Many people ask, 'At what level is it copying from a copyright work and at what level are you copying a style?' That is an issue that copyright law deals with anyway. It is similar to what I was saying about substantial reproductions. If you copied a Rubens or a Brett Whitely exactly, or so that it contained identifiable elements of it, copyright applies. You can stylise it and alter it, but they are tests that the Copyright Act and case law have already put into place. With indigenous art the stylising is getting further and further away from copyright infringements. As I was saying, it is actually making people who are infringing become smarter. They try to keep ahead of copying. The fact is that they are going to indigenous textbooks and copyright works to make those stylised designs and there is that intention to market the work as indigenous.

Mr CADMAN—I am trying to follow what you are saying and analyse it. Are you saying that, if they purport that something is Aboriginal or Torres Strait Islander but it is prepared by a designer in, say, a Sydney back block and put on a fabric, they should not be claiming that it is Aboriginal or Torres Strait Islander? Is that it?

Ms Janke—It depends. For instance, the intention with the carpets was to sell them as Aboriginal designed carpets, and the original Aboriginal works were altered under the instructions of the infringers to make it look more pleasing for reproduction on a carpet. That sort of thing goes on.

CHAIR—Why is that any different from, say, somebody taking a stylised version of, say, Ken Done and putting it on a t-shirt? Is that different from what you are speaking about in relation to indigenous art? This leads back to whether the existing provisions of the law are sufficient to deal with the situation of indigenous art.

Ms Janke—The art embodies a story. Depending on the artist, the knowledge embodied in the story may have sacred significance. In the case of the carpets, the art works were of that nature. The art was altered and parts were taken and put on the carpet where it was going to be walked on. That is very derogatory to the culture. It is saying that it is not significant. It is derogatory, it is mutilation. That sort of thing is very offensive to indigenous people.

CHAIR—Can we legislate for cultural insensitivity?

Ms Janke—A lot needs to be done with education and awareness—where infringers meet communities, as I mentioned before. That could assist. We are seeing within the copyright laws and the cases the recognition of cultural harm damages. In the latest case, Bulun Bulun and Anor v. R&T Textiles, the issues of equitable interests of the group and communal ownership rights in copyright are coming up. Those sorts of issues are now coming up within copyright. Indigenous artists are running those sorts of cases, so cultural significance and communal ownership are coming in.

CHAIR—There is a division in the House of Representatives. We will suspend the hearing until after the division. Please wait because there is a little more we would like to talk to you about.

Sitting suspended from 11.18 a.m. to 11.32 a.m.

CHAIR—We might resume the hearing now.

Ms ROXON—I was about to ask a question which I have completely forgotten. I am sure it will come back to me as we go along.

CHAIR—Ms Roxon is recalling what she was about to ask you. One of the things that struck me while I was walking down to the chamber, in light of the discussion we had, was that it seems to me that there is an increasing use of court proceedings by indigenous artists and that that in itself must be having an educative effect within the community generally.

Mr Francis—Yes, again, it was so overdue. I do not believe we have got past the hurdles of what was happening a number of years ago, when indigenous art and culture were in the common domain and were expected to be exploited. There is certainly more litigation happening. Until that general national perception is changed, I think we should see a lot more. Eventually, it is also a matter of that education program. That is part of it. Yes, there are more, and I believe there need to be more before there is more equity in the market.

Ms Janke—I will add to that also. Because the artist is responsible to the community when a community's design ends up on a carpet or on a tea towel, they are answerable to the community. They could lose the right to paint, like Banduk Marika in the carpet case. She said she did not want to paint. Their rights to produce and reproduce the images are threatened when they are reproduced in that way. They are answerable to the community. Where the artist is taking action in the courts, that is seen as being a means of meeting their obligations under customary law. They face serious possible punishments. Even though they did not authorise it, it is seen as them being linked to it and they have the responsibility to ensure that something is done about it. That is why things like the infringer going back to the community are very important. They are seeing within the cultural setting how indigenous artists are responsible for their artworks and the impact that the infringements are having on the culture.

The sorts of remedies that NIAAA is asking for here include public letters of apology and the right for it to meet the statutory recognition of cultural harm damages. Within defamation law we are seeing things like letters of apology and where victims are meeting the transgressors—those sorts of things.

Mr Francis—Those additional remedies are already in place in some forms.

CHAIR—In the carpets case, Justice von Doussa recognised, in a sense, that part of the basis for the award of damages that he made was the cultural harm that he found to exist.

Mr Francis—Part of what we are looking for is for those statements to be reinforced. That is part of what the presentation is about. For people who have had their works copied, and it has caused them harm, the apology concept is an issue. In the eyes of their community, these people, in a cultural sense, have been defamed because they have transgressed and they can be seen to have transgressed. Although they are not the ones who are at fault, the community sees them that way. There are quite significant reasons why we are recommending these changes.

Ms ROXON—The question I want to ask, and I apologise if I missed it at the introduction of your comments, follows on from a question from Duncan Kerr about authenticity. Has the litigation that is starting to be taken, and the examples you have given us are mostly copyright examples, been occurring under the Trade Practices Act or fair trading legislation in relation to misrepresenting an Aboriginal artwork rather than being a strict copy of anybody's work?

Mr Francis—I do not know of any specific NIAAA cases that have used that facility under law but certainly that is what we are looking at.

Ms Janke—In my practice, yes, we have tried to use section 52—misleading and deceptive conduct—where it has been stylised or where it has been passed off as an Aboriginal product. Some products have been done cleverly; they might use an indigenous name or design and that sort of thing, but they never really get past the letter of demand level.

Ms ROXON—Do you think that is a cost issue rather than there being any inadequacy in the law itself?

Ms Janke—Yes, but also it is heavily guarded by business people. We may write a letter of demand and the reply will come back, 'It is not. We can do this because we are actively promoting indigenous culture.' It is heavily guarded when an issue of misleading and deceptive conduct is brought. It needs to be something for indigenous people, and a good test case in this area would further the area. In the United States, they have legislation which looks at unfair competition and that parasitic marketing of Indian art and craft. That is not here in Australia but something like that would assist indigenous artists. Also, consumers are becoming much more concerned about the products so it is also about consumer protection.

CHAIR—Picking up what you have just said, section 104 of the Indian arts and crafts act in the United States makes it unlawful to offer or display for sale or sell any good in a manner that falsely suggests it is Indian produced, an Indian product or the product of a particular Indian tribe or Indian arts and crafts organisation registered within the United States. The comment made in the submission about that is that the remedial legislation is controversial, draconian and very effective. Can you tell me more about the effectiveness of it.

Ms Janke—There are fines imposed if a business markets a product as Indian. It relates to the authenticity and the origin of the product.

CHAIR—I am asking how we know it is effective. What is the evidence for the effectiveness of it?

Ms Janke—There is the fact that there are fewer rip-offs. They have organisations similar to NIAAA and self-governing structures which can enter into agreements with people. They are also more able to market their works where in Australia the artwork is not being marketed by indigenous people. I am not sure of the impact on the US economy or what the return to the artist is. In a way, it acts like the certification mark but it also has the support of legislation. This legislation gives consumers the certainty that a product is Indian and that an Indian person is benefiting from the sale of the product.

Mr CADMAN—I find this very difficult to say but, if you made a mat out of some Christian factors and put it down on the floor and invited people to walk on it, I could find that offensive. If I were a Muslim I could find the same thing, and I have recourse and avenues other than copyright to deal with that. I am trying to sort out in my mind the copyright boundaries. I think you raised a lot of issues which are not copyright factors. We have processes of defamation and all sorts of things that could be used, but we seem to be struggling towards another concept here that I, as an artist, have the approval of my community to do a certain thing. If you go and copy that, you have offended the community,

clan, family or group because they are the owners and not me, who happens to be the artist. That is a concept that I do not think we have dealt with properly.

I do not think there can be a tag that says, 'Because this is Aboriginal, an Aboriginal person must control it.' An Aboriginal person must have the right to convey rights to somebody else if they wish. If they are the artist they ought to be able to convey whatever rights they think appropriate to another person, whether they are Aboriginal or not, otherwise you would have every section in Australia claiming Icelandic or Romanian, or whatever, rights to their particular work. The uniqueness of something or the creation of it is the key factor, isn't it? It is not its ethnicity or its cultural background. That influences the expression but it is not the key factor that makes it a unique thing. It is the fact that I produced it or that that person produced it.

Mr Francis—I think we are saying that that is not the case—the uniqueness of the art is related to the group or the clan as well as the individual. That is what we are talking about here.

Mr CADMAN—Wait a minute, let's sort this out. Surely the expression of my capacity to get it onto a material is my artistic ability. The content relates to the group. Is that right?

Mr Francis—Your ability to paint—yes, certainly.

Mr CADMAN—The uniqueness of what is on that canvas—or that bark or that piece of music—is attributable to my artistic capacity, but the content is owned by the group. Is that right?

Mr Francis—Yes.

Ms Janke—Yes.

Mr CADMAN—There are two factors at work here, aren't there? There is my artistic capacity plus the group ownership.

Ms Janke—Yes.

Mr Francis—Yes.

Mr CADMAN—The ability of a group to define what is theirs and what is not theirs impacts on my ability as an artist to assign copyrights to others. So if the group behind me says, 'We own this; it is part of our heritage and we have let you use it,' I as the artist must acknowledge that before I assign the capacity for people to use it. If anybody offends that, then they are interfering with a notional concept of copyright.

Ms Janke—The case of Bulun Bulun v. R&T Textiles looked into it. It is like the artists. They have a fiduciary obligation to the group, and they may give rights consistent with the rights they have been granted by the group. But where it is outside of that, they have an obligation—

Mr CADMAN—Who has?

Ms Janke—The artist has an obligation.

Mr CADMAN—Absolutely. That is what I am driving at.

Ms Janke—As I said, within the customary obligations and the laws, there can be significant punishment for the artist where they step out of the parameters.

Mr CADMAN—That is not a worry for us in this copyright process. It is what the artist does with the material they have produced—the song or the painting—that is important as far as copyright. If anybody cuts across it or infringes that process, that is infringing copyright. I do not know how you give the artist more control over what they do. If they do not grant a right to somebody to reproduce, then that person cannot reproduce.

Ms Janke—Yes, but in many cases the artist may not have granted the right. For instance, in Bulun Bulun v. R&T Textiles—

Mr CADMAN—Does not copyright cover that?

Ms Janke—The artist consented for authorised uses under customary law, like reproduction in a catalogue or in an art portfolio book—

Mr CADMAN—Are you saying the artist is not in control of that under current copyright?

Ms Janke—Yes, they are. But when it is infringed by someone, then they have an obligation to ensure that it is remedied.

Mr CADMAN—Aren't you really saying that it is really hard to find out when somebody is infringing? If people infringe my rights as an artist without asking me, and they do all sorts of stuff that I do not know about, it is really hard to find out who is doing what. It is hard to know if it is in a catalogue or if it is on a tea towel.

Ms Janke—That is one level. It is also very hard to enforce that, because the artist might not know that it has occurred, like you said, and they are not able to take a case against the infringer. And a lot of the stuff may be occurring overseas. A lot of the infringing material is made overseas.

Mr CADMAN—I could imagine that.

Ms Janke—It comes into Australia and it is sold. The Customs allow it through.

Mr CADMAN—It is not the role of Customs to deal with that sort of stuff.

CHAIR—I thought you were also saying that the civil law in Australia should in some way recognise Aboriginal customary law insofar as the artist is a representative of the broader community from which he or she comes. Is that what you were saying? In a sense,

didn't Justice von Doussa do that, maybe in a roundabout way, by finding that there was a fiduciary relationship? It might not have been expressed in the way that the customary law would express it, but nonetheless he arrived at the same conclusion.

Ms Janke—Yes. It is recognising that these laws are in existence. They impact on indigenous artists and they impact on indigenous communities, and in a way his judgment was recognising that. But copyright law was the obligation of a copyright owner, sitting in with his obligations as a member of an indigenous clan.

Mr CADMAN—On this issue, though, you do not want the laws of Australia to cut across the relationship between the community and the artist, do you? That is an arrangement whereby the community can either deal with it, or if someone has published without their permission they can have his guts for garters by the normal processes, can't they? So you do not want us to get into that part between the artist and the customary group.

Ms Janke—There are ways, and the von Doussa judgment mentions how it could be done. For instance, where the artist might not be in a position to take action and the obligation is still owed to the group, could the group then take action against the infringer? If you use the scenario where Mr Bulun Bulun was the artist and the co-applicant was the representative of the clan and their communal interests, if Mr Bulun Bulun was unable or unwilling to take action against the fabric importers, perhaps then the clan owners should be able to.

Mr CADMAN—That is hard.

CHAIR—So it is something akin to a class action, but it is different, because in a class action each member has got a claim; whereas here the members of the community may not be the artists themselves. But you are saying there is a communal ownership.

Mr CADMAN—The first thing I think of is possible abuses. I might say, 'That piece of music belongs to the Cadman clan. Don't you play it, Charlie, or I'll take you for a row.' How do you establish, if I am the sole remaining person of that group, that it is not my music to begin with, when I claim that it is my music? I see the prospect for all sorts of difficulties between different groups and different individuals. I do not know how you would advance that.

Mr Francis—There would be difficulties between different groups. You are talking about when particular clans have lost all the members of their clans. That sort of situation occurs in people being recognised as indigenous Australians as well. That is a problem, and I think it is always going to be a problem.

Mr CADMAN—But you are dealing with something very esoteric here, if you are talking about the notes in a song or a scale on a didgeridoo.

CHAIR—We are running out of time. Thank you for your submission and for coming along and discussing this with us today. It has certainly given us some food for thought. We will consider these things in the course of the inquiry. If at any stage there is something

further arising out of our discussion which you would like to put before us, you are welcome to do so. We look forward to reading a copy of the report which you referred to.

Resolved (on motion by **Mr Cadman**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 11.54 a.m.